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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 138

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND DE SYLVA, BROWN & HENDERSON, INC., A CORPORATION,

vs.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

No. 139

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION,

vs.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

No. 140

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION,

vs.

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED MAY 22, 1930

(35,052, 35,053, 35,054)

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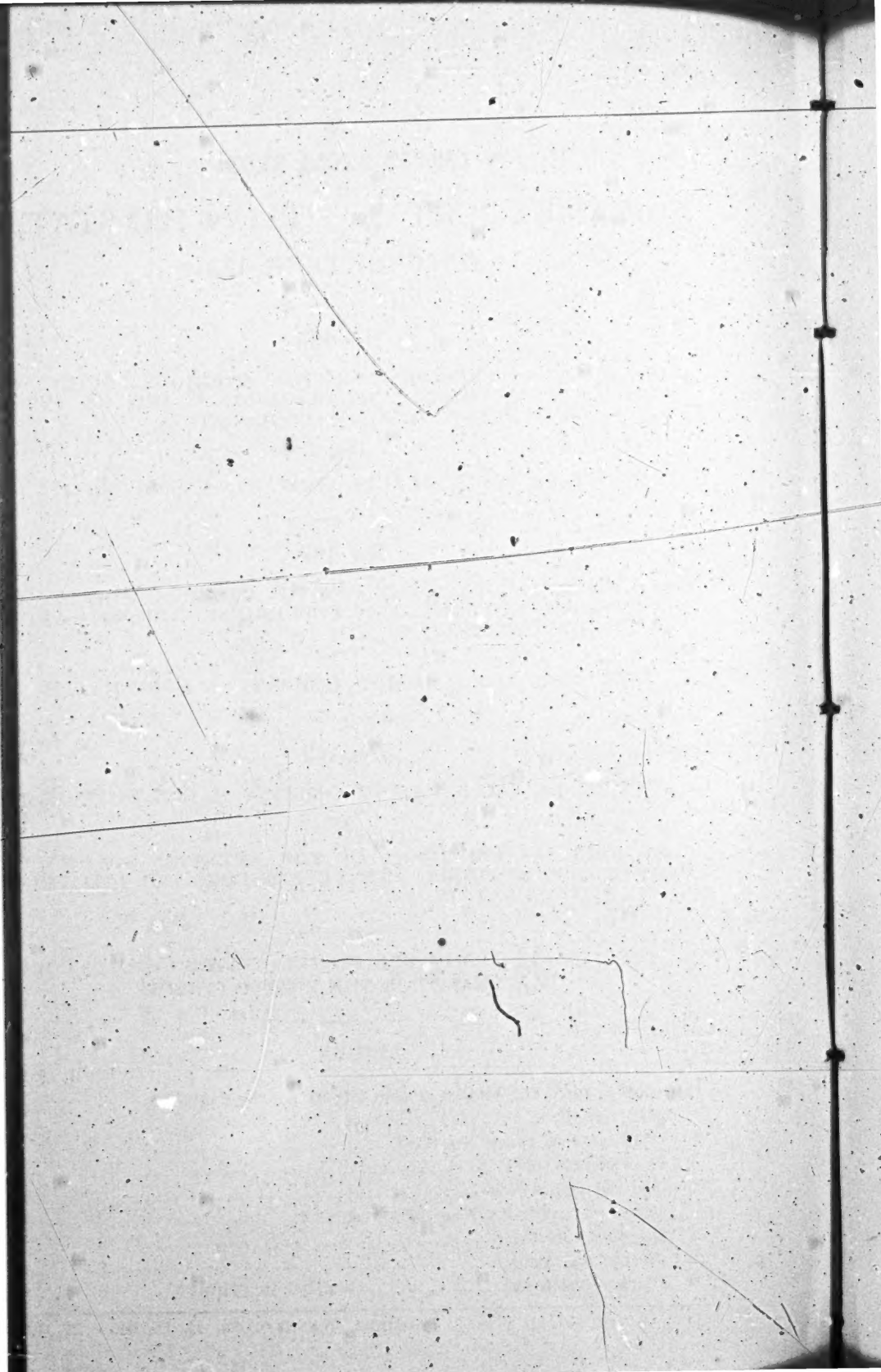

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, 1930

No. 8680

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8681

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8689

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellant,

vs.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellee

Appeals from the District Court of the United States for the Western District of Missouri

Mr. Thomas G. Haight (Mr. Maurice J. O'Sullivan, Mr. Nathan Burkan, Mr. E. S. Hartman, and Mr. Louis D. Frohlich were on the brief) for Gene Buck, as President, etc., et al.

Mr. Charles M. Blackmar and Mr. Kenneth E. Midgley (Messrs. Meservey, Michaels, Blackmar, Newkirk & Eager were on the brief) for Jewell-La Salle Realty Company.

Before Booth and Gardner, Circuit Judges, and Sanborn, District Judge

[fol. 2] The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that records on appeals Nos. 8680, 8681, and 8689 having been submitted together and now pending before it, disclose the following:

Statement of Facts

Appeal No. 8680

In Appeal No. 8680 suit was brought in the United States District Court for the Western District of Missouri, by Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, Plaintiffs, vs. Wilson Duncan, operating Radio Station KWKC, and Jewell-La Salle Realty Company, a corporation, Defendants, for an injunction and damages for infringement of the copyright of a musical production. It was stipulated by the parties that the facts stated in the bill of complaint were true; and certain additional facts were also stipulated. From the bill and the stipulation the following facts have been gathered:

[fol. 3] I. The American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"), is an unincorporated association organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in the Southern District of New York. The membership of the Society exceeds 700, and is comprised of authors, composers and publishers of musical works. Said Society was organized and is now operating for the purpose of protecting the performing rights in musical works, copyrighted by its members respectively, against infringement because of the public performance thereof for profit.

Gene Buck is president of said Society. Because said membership is exceedingly numerous and it would be im-

practicable to join all the members of said Society as parties plaintiff, and the issues and questions involved here are of common and general interest to all of the members of the Society, the said Society has duly authorized and empowered the said Gene Buck as president thereof to institute and prosecute this suit in its behalf; and this suit is accordingly brought by plaintiff Gene Buck as president of The American Society of Composers, Authors and Publishers, for and on behalf of said Society.

II. The plaintiff De Sylva, Brown & Henderson, Inc. (hereinafter for brevity's sake called the "Publisher"), is a corporation organized under the laws of the State of New York, having its principal place of business in the Southern District of New York, and at all times hereinafter mentioned, was engaged in the business of printing, publishing and vending of copyrighted musical works.

III. The defendant Wilson Duncan is an individual and a resident of the Western District of Missouri; and defendant Jewell-La Salle Realty Company is a corporation organized and existing according to law, having an office and [fol. 4] its chief place of busines in the Western District of Missouri.

IV. At all of the times herein mentioned, defendant Jewell-La Salle Realty Company (hereinafter for convenience called the "Company"), owned and operated a certain hotel in Kansas City, Missouri, known as the La Salle Hotel, for the entertainment of its guests and the public generally. Said guests were guests for hire, and said hotel was operated as a commercial enterprise for profit. For the entertainment of the guests in said hotel, and of the public generally, and to promote the business of the Company, and to make said hotel an attractive and desirable place, and to attract trade and custom thereto, and in order that renditions of musical compos-tions might be heard in the hotel daily by the guests, the Company, among other instruments and devices, caused to be installed and maintains in said hotel a master radio receiving set, which receives and converts radio waves transmitted from radio broadcasting stations into sound. Said receiving set was equipped with wires leading therefrom to all parts of the

hotel, including the public rooms, parlors, and lobby, as well as into about two hundred private rooms. Loud speakers were attached to the wires leading from the receiving set, so that any musical composition picked up by said receiver could be and is simultaneously heard throughout the hotel.

V. At all of the times herein mentioned, defendant Wilson Duncan was the owner of and operated a certain radio station in Kansas City, Missouri, known and designated as KWKC. Said defendant was licensed by the Government of the United States to operate such radio station as a commercial station. Such license was issued to said defendant on an application filed by him with the department having jurisdiction, stating that said radio station was operated [fol. 5] and was to be operated for business and commercial purposes. Said defendant operated the station for profit and for hire, and received rent and income therefrom from persons engaging the facilities of the station, who desired their names or business to be mentioned over it, so that the same might be heard by the general public for the purpose of advertising such names or business. As a part of the business of said defendant and to make the station profitable to said defendant, and to attract others to engage the facilities of the station and pay therefor, said defendant caused musical compositions to be performed and rendered in and broadcast from the radio station. Such renditions and performances were public and were made available to the public, and were for the purposes of profit, both for said defendant and for others using the station or procuring their names or business to be mentioned over it.

VI. Prior to the 15th day of August, 1927, B. G. De Sylva, Lew Brown and Ray Henderson, citizens of the United States, created and wrote the words and lyrics of a new and original musical composition; and also prior to that date they composed and set original music to the words and lyrics, constituting a musical composition entitled, "Just Imagine."

VII. Prior to the 15th day of August, 1927, the authors and composers assigned such composition to the Publisher, including all rights therein and the right to secure copyright therein.

VIII. On the 15th day of August, 1927, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright 1927 by De Sylva, Brown and Henderson, Inc."

IX. After publication of such composition with such notices of copyright, the Publisher promptly on the 16th day of August, 1927, deposited in the office of the Register [fol. 6] of Copyrights, Washington, D. C., two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work; and said work was duly registered by the said Register of Copyrights, who thereupon issued his certificate of copyright registration therefor as Class E, XXc., No. 670767.

X. Since August 15, 1927, such composition has been published by the Publisher; and upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth in paragraph VIII hereof.

XI. Prior to the 1st day of January, 1926, the Publisher, for a valuable consideration, by an instrument in writing, duly assigned, transferred, and set over to the Society the exclusive non-dramatic performing rights in and to any and all musical compositions, the copyright of which was then owned by the Publisher, for the term commencing January 1, 1926, and ending January 1, 1931, as well as the exclusive non-dramatic performing rights in and to any and all musical compositions to be thereafter acquired and copyrighted by the Publisher for such term.

XII. The Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph VI hereof, and all the rights secured under such copyright, except as to the rights assigned to the Society as set forth in paragraph XI. The Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in paragraph XI hereof, up to and including the 1st day of January, 1931, and by virtue of such assign-

ment the Publisher holds in trust for the Society the exclusive non-dramatic performing rights of said musical com-
[fol. 7] position secured by said copyright down to and including the 1st day of January, 1931.

XIII. Said composition has been used in connection with the manufacture of parts of instruments serving to reproduce mechanically said musical work, and the Publisher has filed a notice thereof, accompanied by the proper recording fee, in the office of the Register of Copyrights, and said notice is on file and is recorded therein, and the recording fee therefor has been paid to the Register of Copyrights.

XIV. On the 4th day of October and on the 7th day of October, 1928, and at other times prior and subsequent thereto, without the previous knowledge or consent of the Society or of the Publisher, and without subsequent ratification or consent of either the Society or the Publisher, and with full knowledge of said Society's rights in such work and of such copyright belonging to the Publisher, the defendant Duncan by means of his radio broadcasting station, gave and caused to be given public performances and renditions for profit of said musical composition; and the defendant Realty Company by means of its radio receiving set and other devices owned and controlled by it, enabled and caused its guests in the La Salle Hotel to hear said musical production so performed and rendered by said defendant Duncan by means of his radio broadcasting station.

XV. No pre-arrangement existed between the defendant Duncan and the defendant Company with respect to what music should be broadcasted by Duncan or received by the Company other than what might be said to be the usual pre-arrangement between any broadcaster and any person commercially operating a receiving set. The defendant Duncan operated his radio broadcasting station without any connection whatsoever with the Company. He selected his own
[fol. 8] programs and broadcasted them for the benefit of himself and whoever chose to tune in and receive them.

XVI. On May 29, 1928, there was addressed to said defendant Company by registered mail a letter, advising it generally of the terms of the Copyright Act. Enclosed therewith was a list of the members of the American Society of Composers, Authors, and Publishers. The name of the

plaintiff De Sylva, Brown & Henderson, Inc., was included in said list of members. Defendant Company was informed that unless and until license was obtained from said American Society it should strictly avoid the rendition or performance in its hotel of any musical compositions copyrighted by any member of said Society, under any circumstances.

An order pro confesso for failure to answer was entered against the defendant Duncan; later, a final decree was entered granting an injunction and damages against him, and dismissing the bill as to defendant Jewell-La Salle Realty Company for lack of equity.

The contention of appellant is that the Jewell-La Salle Realty Company, through the use of its receiving set and loud speakers on the dates above mentioned gave a public performance for profit of the musical composition in question within the meaning of 17 USC Sec. 1 (e).

The contentions of the appellee are (a) that the Jewell-La Salle Realty Company was not a performer within the meaning of the statute cited; (b) that the alleged performance in the hotel was not "for profit" within the meaning of those words as used in the statute.

Question Certified

This court, being in doubt, desires the instruction of the Supreme Court upon the following question, a decision of which is deemed indispensable to a determination of appeal No. 8680 now before it, and to a proper discharge [fol. 9] of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

[fol. 10] STATEMENT OF FACTS

Appeals Nos. 8681 and 8689

These appeals grow out of one suit which involved in its first count a state of facts similar to those in No. 8680, except that the hotel company alone was made defendant. The seventh count differed from the first count in this: that the infringement alleged was that the hotel company by means of an orchestra caused the production in the hotel of a musical composition protected by a copyright,—the rights under which were owned by plaintiffs,—no consent to such production having been obtained by defendant. There was no proof of actual damages. The decree dismissed the first count for lack of equity; but awarded damages to plaintiff on the seventh count in the sum of $250.

The plaintiffs have appealed (No. 8681) from that part of the decree which dismissed the first count. The defendant has appealed (No. 8689) from that part of the decree which awarded damages on the seventh count.

The contentions of the parties in appeal No. 8681 are the same as in appeal No. 8680.

The contention of the appellant in appeal No. 8689 is that the court adopted the wrong statutory measure of damages; that instead of adopting the amount in the "no other case" clause of Section 25(b) of the Act of March 4, 1909 (35 Stat. 1081, Chap. 320) as amended (37 Stat. 489) [17 U. S. C. Sec. 25], it should have adopted the amount fixed by Section 25(b) Fourth.

QUESTIONS CERTIFIED

This court, being in doubt, desires the instruction of the Supreme Court upon the following questions, a decision of which is deemed indispensable to a determination of the appeals in Nos. 8681 and 8689 now before it, and to a proper discharge of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel [fol. 11] and under his control and for the entertainment

of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such musical composition within the meaning of 17 U. S. C. Sec. 1(e)?

Question II. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called "no other case" clause of Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25), reading, "and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?"

Question III. Is Section 25(*b*) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?

Question IV. In Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, "nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant," confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25(b)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

[fol. 12] Clerk's certificate to foregoing certificates omitted in printing.

[Endorsed:] U. S. Court of Appeals, Eighth Circuit. No. 8680. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8681. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8689. Jewell-La Salle Realty Co., vs. Appellant, Gene Buck et al. Certificates of questions to Supreme Court U. S.

Endorsed on cover: File No. 35,052, 35,053, 35,054. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 921. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. (Certificate). Term No. 922. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. Term No. 923. Jewell-La Salle Realty Company, a corporation, vs. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation. Filed May 22, 1930. File. No. 35,052, 35,053, 35,054.